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REGIONAL COMMITTEE OF EXPERTS
ON MEANS OF IMPLEMENTATION IN THE ARAB STATES OF
MODEL PROVISIONS ON INTELLECTUAL PROPERTY ASPECTS OF
PROTECTION OF EXPRESSIONS OF FOLKLORE

Doha, 8 to 10 October 1984

MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

with a

COMMENTARY

This document contains the text of the model provisions adopted by the Committee of Governmental Experts convened jointly by Unesco and WIPO at Geneva from 28 June to 2 July 1982. The said text is accompanied by a commentary prepared by the Secretariat of Unesco and the International Bureau of WIPO.

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prepared by the Secretariats of
the United Nations Educational, Scientific and Cultural Organization (Unesco)
and the World Intellectual Property Organization (WIPO)

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I.

INTRODUCTORY OBSERVATIONS

Need for the Legal Protection of Expressions of Folklore

1. Folklore is an important cultural heritage of every nation and is still developing--albeit frequently in contemporary forms--even in modern communities all over the world. It is of particular importance to developing countries which more and more recognize folklore as a basis of their cultural identity and as a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them. Folklore is to these countries increasingly important from the point of view of their social identity, too. Particularly in developing countries, folklore is a living, functional tradition, rather than a mere souvenir of the past.

2. The accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography may lead to improper exploitation of the cultural heritage of the nation. Expressions of folklore are being commercialized by such means on a world-wide scale without due respect for the cultural or economic interests of

the communities in which they originate and without conceding any share in the returns from such exploitations of folklore to the peoples who are the authors of their folklore. In connection with their commercialization, expressions of folklore are often distorted in order to correspond to what is believed to be better for marketing them.

3. In the industrialized countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, at least so far, industrialized countries generally did not establish a legal protection of the manifold national or other community interest related to the utilization of folklore.

4. During the last decade or two, however, it became obvious that--in order to foster folklore as a source of creative expressions--special legal solutions must be found both nationally and at the international level for the protection of folklore. Such protection should be against any improper utilization of expressions of folklore, including the general practice of making profit by commercially exploiting such expressions outside their originating communities without any recompense to such communities.

Attempts to Protect Expressions of Folklore Under Copyright Law

5. The first attempts to explicitly regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Bolivia, 1968 (in respect of musical folklore only); Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980; Tunis Model Law on Copyright for Developing Countries, 1976) and in an international Treaty (the Bangui text of 1977 of the Convention concerning the African Intellectual Property Organization, hereinafter referred to as "the OAPI Convention"). All these texts consider works of folklore as part of the cultural heritage of the nation ("traditional heritage," "cultural patrimony"; in Chile, "cultural public domain" the use of which is subject to payment).

6. The meaning of folklore as covered by those texts is understood, however, in different ways. An important copyright-type common element in the definition according to the said laws (except the Law of Tunisia that contains no definition) is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country. The OAPI Convention mentions creation by "communities" rather than authors, which delimitates creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore using both of these alternatives, and considers it as meaning creations "by authors presumed to be nationals of the country concerned, or by ethnic communities."

7. According to the Law of Morocco, folklore comprises all unpublished works of the kind, whereas the Laws of Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Law of Senegal explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Convention and the Tunis Model Law provide that folklore comprises scientific works too. Most of the statutes in question recognize "works inspired by folklore" as a distinct category of works whose use for commercial purposes requires the approval of a competent body.

8. The "works" of folklore are protected under the said texts against fixation for profit-making unless such fixation has been expressly authorized. The Law of Senegal requires prior authorization also for public performance of folklore with gainful intent. The Tunis Model Law suggests the same kind of protection as the usual works under copyright benefit from.

9. An attempt to protect expressions of folklore by means of copyright law has also been undertaken at the international level in the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention. The Main Committee for the revision of the substantive provisions of the Berne Convention set up a special Working Group to elaborate relevant suggestions and to decide "what would be the most suitable place in the Convention for a provision dealing with works of folklore." The proposal of the Working Group was adopted unanimously, with six abstentions (Records of the Intellectual Property Conference of Stockholm (1967), Vol.II. Summary Minutes, Main Committee I, 964 to 981 and 1505 to 1515). As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the

following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate declaration to all other countries of the Union." It is interesting to note that the provision, as adopted, does not refer to folklore and that it certainly embraces also works which are not part of folklore. It is only the legislative history of the provision that indicates that folklore was (also) intended to be covered.

10. In any case and at least so far, legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient. In particular as regards the provisions in the Berne Convention, no notification has been deposited with the Director General of WIPO as yet concerning designation of a national authority to protect in countries of the Berne Union the rights in works of authors of unknown identity. Thus it would seem that the measures taken so far in the field of copyright are not sufficient to control the commercial use of folklore, and one has the impression that copyright law is, after all, not the right kind of law for protecting expressions of folklore. This might be so because whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a decisive mark of individual originality. Traditional creations of a community, such as the so-called folk tales, songs, music, dances, designs or patterns, are generally much older than the duration of copyright so that, for this reason alone, a copyright-type protection, limited to the life of the author and a relatively short period thereafter, does not offer to folklore a long enough protection.

Indirect Protection by Means of Neighboring Rights

11. Another existing legal means which may be used for the protection of expressions of folklore is the protection of the so-called neighboring rights. Protecting performers as regards their performances or producers of phonograms or broadcasting organizations as far as their fixations or broadcasts are concerned means--where such performances, fixations or broadcasts are performances, fixations or broadcasts of expressions of folklore--an indirect protection of the expressions of folklore themselves.

12. Such indirect possibility of protecting folklore should be made use of, and developing countries are well advised if, for this reason too, they adopt laws protecting the rights of performers, producers of phonograms and broadcasting organizations. Adherence to the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and to the Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms serves similar purpose. In order to avoid any misunderstanding as regards the protection of performers who perform or recite, respectively, expressions of folklore such as folk songs, folk tales, folk music, folk dances or folk plays, it is advisable to make it clear by means of an explicit provision in any law protecting performers of literary or artistic works that the performance of expressions of folklore shall be regarded as a performance of a literary or artistic work.

13. However, neighboring rights cannot fully satisfy the need for legal protection against improper use of creations of folklore since they cannot prevent the copying of expressions of folklore outside performances. Furthermore, the limited duration of the protection of neighboring rights does not fit folklore for the same reasons as the limited duration of copyright does not fit it.

14. For all these reasons, it appears to be necessary to establish, as regards intellectual property aspects of expressions of folklore, a special (*sui generis*) type of law for an adequate protection against unauthorized exploitation.

Search for an Adequate System of the Intellectual Property Aspects of the Protection of Expressions of Folklore

15. On April 24, 1973, the Government of Bolivia sent a memorandum to the Director General of Unesco requesting that that Organization examine the opportunity of drafting an international instrument on the protection of folklore in the form of a protocol to be attached to the Universal Copyright Convention.

16. Following that request, and in pursuance of the decision of the Intergovernmental Committee of the Universal Copyright Convention in December 1973, the Unesco Secretariat made a study on the desirability of providing for the protection of folklore on an international scale which was submitted to that Committee and the Executive Committee of the Berne Union at their 1975 sessions. The Committees referred the whole problem to the Cultural Sector of Unesco in order that it might undertake an exhaustive study of all questions inherent in the protection of folklore. In view of the links that such protection could have with copyright, the Committees also decided that the report on the results of that work should be submitted to their next sessions, where they would reexamine the question. In 1977, the Director-General of Unesco convened a Committee of Experts on the Legal Protection of Folklore (Tunis, July 11 to 15, 1977), which reached the consensus that it was necessary to submit folklore protection to a complete examination of all the problems posed thereby.

17. As recognized by the Executive Committee of the Berne Union, and the Intergovernmental Committee of the Universal Copyright Convention, at their 1977 sessions, on the basis of the approach on this subject reached by the Committee of Experts mentioned before, the problem has many aspects, and it comprises questions of identification, material conservation, preservation and reactivation, as well as sociological, psychological, ethnological, politico-historical and other aspects. All these aspects are interdependent and call for a global study on the protection of folklore which is being dealt with on an interdisciplinary basis within the framework of an overall and integrated approach, by Unesco. Nevertheless, special efforts should be made to find solutions to the problem of the intellectual property aspects of the legal protection of expressions of folklore, as proposed by the International Bureau of WIPO and decided by the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention at their sessions in February 1979.

18. In accordance with the decisions of the respective Governing Bodies of Unesco and WIPO, the Secretariat of Unesco and the International Bureau of WIPO convened a Working Group (referred to hereinafter as "the Working Group") at Geneva, from January 7 to 9, 1980, to study a draft of Model Provisions intended for national legislation as well as international measures for the protection of works of folklore. The Working Group was attended by 16 experts from different countries invited in a personal capacity by the Directors General of Unesco and WIPO.

19. The working papers available to the Working Group consisted of the following documents:

(i) "Model Provisions for National Laws on the Protection of Creations of Folklore and a Commentary on those Model Provisions" (document UNESCO/WIPO/WG.I/FOLK/2 and 2 Add.) prepared by the International Bureau of WIPO;

(ii) "Study on the International Regulations of Intellectual Property Aspects of Folklore Protection" (document UNESCO/WIPO/WG.I/FOLK/3) prepared by the Secretariat of Unesco.

20. After considering the said working documents, the Working Group agreed that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such form of protection could apply and (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

21. The Working Group recommended, in respect of the model provisions for national laws on the protection of creations of folklore, that the Secretariats should prepare a revised draft and commentary thereon, taking into consideration all the interventions made in the Working Group, and that such a draft with its commentary should be presented for further consideration at a subsequent meeting. (Report of the Working Group, document UNESCO/WIPO/WG.I/FOLK/5, paragraph 21.)

22. Accordingly, the Secretariats prepared a revised draft entitled "Revised Model Provisions for National Laws on the Protection of Expressions of Folklore," and a Commentary thereon (documents UNESCO/WIPO/WG.II/FOLK/2 and 3), which were submitted to the Working Group convened by Unesco and WIPO for a second meeting at Paris, from February 9 to 13, 1981. The Working Group discussed the proposed model provisions, proposed several amendments, including new sections, to them. In conclusion, the Working Group adopted what was called "Model Provisions for National Laws on the Protection of Expressions of Folklore" (Annex I to document UNESCO/WIPO/WG.II/FOLK/4), in order to be presented for further consideration to a Committee of Governmental Experts, along with a Commentary to be prepared by the Secretariats.

23. In the meantime, Unesco convened a Committee of Governmental Experts on the Safeguarding of Folklore, at Paris, from February 22 to 26, 1982. That Committee adopted 30 recommendations, addressed to Unesco or the States or both, concerning definition, identification, conservation and preservation of folklore. As regards utilization of folklore, it was recommended that, with regard to the work currently being conducted jointly by Unesco and WIPO on the "intellectual property" aspects of folklore protection, those two organizations continue their work in that area.

24. In pursuance of Resolution 5/01 adopted by the General Conference of Unesco at is twenty-first session (Belgrade, September-October 1980) and the decision taken by the Governing Bodies of WIPO at their November 1981 sessions, the Directors General of Unesco and WIPO convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore (hereinafter referred to as "the Committee"), which met at WIPO headquarters in Geneva from June 28 to July 2, 1982. The Committee discussed the Model Provisions mentioned in paragraph 22, along with the relevant Commentary prepared thereon by the Secretariats (document UNESCO/WIPO/FOLK/CGE/I/4) and adopted what is called "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (hereinafter referred to as "the Model Provisions"). The Committee also requested the Secretariats to prepare a completed version of the Commentary on the Model Provisions, taking into consideration a number of observations and suggestions made by one or more experts of the Committee. The Model Provisions adopted by the Committee and the commentary prepared thereon by the Secretariats are contained in Parts II and III, respectively.

II.

THE MODEL PROVISIONS

25. The Model Provisions read as follows:

"Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

[Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore is prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions;

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests;

The following provisions shall be given effect:]

SECTION 1

Principle of Protection

Expressions of folklore developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

SECTION 2

Protected Expressions of Folklore

For the purposes of this [law], "expressions of folklore" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

(i) verbal expressions, such as folk tales, folk poetry and riddles;

(ii) musical expressions, such as folk songs and instrumental music;

(iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

(iv) tangible expressions, such as:

(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;

(b) musical instruments;

[(c) architectural forms].

SECTION 3

Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned] when they are made both with gainful intent and outside their traditional or customary context:

(i) any publication, reproduction and any distribution of copies of expressions of folklore;

(ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

SECTION 4

Exceptions

1. The provisions of Section 3 shall not apply in the following cases:

(i) utilization for purposes of education;

(ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;

(iii) borrowing of expressions of folklore for creating an original work of an author or authors;

2. The provisions of Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:

(i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

(ii) utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

SECTION 5

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.

2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

SECTION 6

Offences

1. Any person who willfully [or negligently] does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...

2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1,][community concerned] willfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to ....

3. Any person willfully deceiving others in respect of the source of artefacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manner, presenting such artefacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not been derived, shall be punishable by ....

4. Any person who publicly uses, in any direct or indirect manner, expressions of folklore willfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by ....

SECTION 7

Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

SECTION 8

Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

SECTION 9

Authorities

[1.] For the purpose of this [law], the expression "competent authority" means ...

[2. For the purpose of this [law], the expression "supervisory authority" means ...]

SECTION 10

Authorization

1. Applications for individual or blanket authorization of any utilization of expressions of folklore subject to authorization under this [law] shall be made [in writing] to the [competent authority][community concerned].

2. Where the [competent authority][community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established][approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].

[3. Appeals against the decisions of the competent authority may be made by the person applying for the authorization and/or the representative of the interested community.]

SECTION 11

Jurisdiction

[1. Appeals against the decisions of the [competent authority] [supervisory authority] are admissible to the Court of ...]

[2.] In case of any offence under Section 6, the Court of ... has jurisdiction.

SECTION 12

Relation to Other Forms of Protection

This [law] shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organizations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore.

SECTION 13

Interpretation

The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

SECTION 14

Protection of Expression of Folklore of Foreign Countries

Expressions of folklore developed and maintained in a foreign country are protected under this [law]

(i) subject to reciprocity, or

(ii) on the basis of international treaties or other agreements."

III.

COMMENTARY ON THE MODEL PROVISIONS

The Legal Nature of the Model Provisions

26. Although the Model Provisions are provisions for a law, the term "law" appears in square brackets in order to make it clear that they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code, and do not have to be a statute passed by the legislative body, but may be a decree or decree law, for example. The Model Provisions were designed with the intention of leaving enough room for national legislations to adopting the type of provisions best corresponding to the conditions existing in a given country.

Title of the Model Provisions

27. In view of the wide scope of the protection of folklore, the title of the Model Provisions was decided on so as to adequately reflect their particular subject, namely the intellectual-property-type protection of expressions of folklore against illicit exploitation and other prejudicial actions. A rather detailed definition of the subject in the title itself is also necessary to avoid possible confusion with other documents which may be drawn up on the various other aspects of the protection of folklore.

The Preamble

28. The Sections of the Model Provisions are preceded by a Preamble (the recitals) which give the reasons for establishing legal protection of expressions of folklore. This Preamble is proposed in square brackets, in view of the fact that recitals are not usual in the statutes of many countries. The Preamble is intended to summarize the main reasons for the proposed protection and its purpose. It is also intended to reflect a basic requirement, underlying the Model Provisions, namely the necessity of maintaining an appropriate balance between protection against abuses of expressions of folklore, on the one hand, and freedom and encouragement of its further development and dissemination, on the other.

Summary of the Provisions

29. The Model Provisions consist of 14 Sections. The principle of protection is stated in Section 1. Section 2 defines "expressions of folklore." Section 3 specifies the utilizations which are subject to authorization, whereas Section 4 sets out the exceptions to the need for authorization. Section 5 determines the way in which the source of the expression of folklore utilized must be indicated. Sections 6 to 8 deal with offenses, sanctions and related measures. Section 9 determines the "competent" and "supervisory" authorities. Section 10 lays down the procedure for requesting and granting the required authorization. Section 11 establishes the jurisdiction of courts. Section 12 expressly maintains copyright and other possible forms of applicable protection. Section 13 provides for the unhindered use and development of expressions of folklore where such use or development is "normal." Section 14 determines the conditions under which expressions of folklore originating from a community in a foreign country are protected.

Principle of Protection (Section 1)

30. This Section stipulates that the subject of protection is any expression of folklore developed and maintained in the country granting the protection. This Section also refers to the acts against which expressions of folklore are protected. They are "illicit exploitation" and "other prejudicial actions." Any utilization in violation of the provisions of Section 3 (unless it is within the scope of the exceptions mentioned in Section 4) would be illicit exploitation. Similarly, non-compliance with the provisions of Section 5, paragraph 1 (subject to Section 4, paragraphs 1(iii) and 2) and commission of the acts described in Section 6, paragraphs 3 and 4 would constitute other

prejudicial actions which are illicit even if they occur in connection with an authorized utilization or with a utilization that does not require authorization. It goes without saying that the protection is granted under the jurisdiction of the country concerned and applies both to nationals and foreigners.

Protected Expressions of Folklore (Section 2)

31. The Model Provisions do not offer any definition of the notion of "folklore." The reason is to avoid possible conflict with relevant definitions which are or may be contained in other documents or legal instruments concerning the protection of folklore. However, for the purposes of the Model Provisions, Section 2 defines the term "expressions of folklore" in line with the findings of the Committee of Governmental Experts on the Safeguarding of Folklore, which met in Paris in February 1982 under the auspices of Unesco. "Expressions of folklore" are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

32. The use of the words "expressions" and "productions" rather than "works" is intended to underline the fact that the provisions are sui generis, rather than of copyright, since "works" are the subject matter of copyright. Naturally, the expressions of folklore may, and--in fact--most of the time do, have the same artistic form as "works."

33. The definition of the term "expression of folklore," adopted for the purposes of the Model Provisions, does not speak of the "cultural heritage of the nation" referred to in the Preamble. It is focussed on artistic heritage, on the one hand, and is community oriented, on the other. Artistic heritage is a particular domain within the more extensive realm of cultural heritage and the Model Provisions are intended to center around the protection of expressions of the traditional artistic heritage rather than to extend also to other forms of cultural heritage. Furthermore, the artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation. "Traditional artistic heritage developed and maintained by a community" is understood as representing a special part of the "cultural heritage of the nation."

34. The fact that only "artistic" heritage is being considered, means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony), substance of legends (e.g. commonly known course of life of traditional heroes like King Arthur and his knights) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of "expressions of folklore." On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to the aesthetic sense of man. Verbal expressions, which would qualify as literature if created individually by an author, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

35. The notion of expressions of folklore of a community covers both the expressions originating in the community concerned and those originating elsewhere but having been adopted, further developed or maintained through generations by that community. It is irrelevant whether an actual expression, consisting of characteristic elements of the traditional artistic heritage, has been developed by the collective creativity of a community or by an individual reflecting the traditional artistic expectations of the community.

36. "Characteristic elements" of the traditional artistic heritage, of which the production must consist in order to qualify as a protected "expression of folklore," means in the given context that the element must be generally recognized as representing a distinct traditional heritage of a community. As regards the question of what has to be considered as belonging to the folklore of a "community," one or two members of the Working Group suggested that the answer required a "consensus" of the community which would certify the "authenticity" of the expression of folklore. The proposed definition does not refer to such "consensus" of the community since making the application of the law subject in each case to the thinking of the community, would render it necessary to make further provisions on how such consensus would have to be verified and at what point in time it must exist. The same would apply to the

requirement of "authenticity," which would also need further interpretation. On the other hand, both the requirement of "consensus" and "authenticity" are implicit in the requirement that the elements must be "characteristic," that is, showing the traditional cultural heritage; elements which become generally recognized as characteristic are, as a rule, authentic expressions of folklore, recognized as such by the tacit consensus of the community concerned.

37. An illustrative enumeration of the most typical kinds of expression of folklore is added to the definition. They are subdivided into four groups depending on the form of the "expression," namely expression by words ("verbal"), expressions by musical sounds ("musical"), expressions "by action" (of the human body) and expressions incorporated in a material object ("tangible expressions"). Each must consist of characteristic elements taken from the totality of the traditional artistic heritage. The first three kinds of expression need not be "reduced to material form," that is to say, the words need not be written down, the music need not exist in the form of musical notation and the bodily action--for example, dance--need not exist in a written choreographic notation. On the other hand, tangible expressions must be incorporated in a permanent material, such as stone, wood, textile, gold, etc. The provision also gives examples of each of the four forms of expression. They are, for the first, "folk tales, folk poetry and riddles," for the second, "folk songs and instrumental music," for the third, "folk dances, plays and artistic forms of rituals," and for the fourth, "drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms." The last-named appears in square brackets to show the hesitation which accompanied its inclusion.

38. Traditional sites of folklore events do not generally qualify as expressions of folklore since they are not usually productions consisting of characteristic elements of the traditional artistic heritage of a community, but only places where expressions of folklore are performed regularly. Certain folklore events, however, may be regarded as protectible artistic expressions by action--kinds of ritual--if they do not represent merely a traditional framework for the utilization of various expressions of folkore to be protected separately.

39. Identification of expressions of folklore originating in and developed by a community could be achieved by keeping an inventory of them. However, such an inventory being related to conservation of folklore, its regulation does not fall within the scope of the Model Provisions. Whenever a competent authority is in doubt whether a given expression is an expression of folklore, it should consult all available sources, including existing catalogues, other records, expert opinion, witnesses and the views of elders of a community.

Utilizations Subject to Authorization (Section 3)

40. The idea of making certain forms of utilization of traditional expressions of folklore subject to authorization is not unfamiliar to creative communities in many countries. Two examples will illustrate this point. In Australia, Peter Banki reported to the Australian Copyright Council on October 3, 1978, that a "permission mechanism is well established among tribal Aboriginals in the Northern Territory" (Report to the Australian Copyright Council, October 30, 1978, p.7). In 1976, claims were made by Australian Aboriginal tribal elders that photographs contained in a book of anthropological studies depicted subjects that had secret and sacred significance to their community and alleged that no proper permission had been given to publish them. As far as Africa is concerned, Professor J.H. Kwabena Nketia (from Ghana) reported that "because of the close identification of groups with folklore a sense of collective ownership of sets of material and repertoire is often generated among such groups ..." and "... members of a community may regard folklore traditions in the public domain as their heritage ... Furthermore, in Africa, this sense of ownership is tied up with the notion of 'performing rights' which tends to be more of an ethical issue than a purely legal one ..." and "Akan oral traditions make references to instances in the past in which some chiefs sought permission from other chiefs to 'copy' their instruments of music ..." or "... in Gnana, there are chiefly designs and patterns associated with specific royal houses ... as we. as patterns with various verbal interpretations that are restricted in respect of ... use" (African Traditions of Folklore, INTERGU Yearbook, 1979; pp. 225-227).

41. The following questions were considered to be potentially relevant in deciding what kinds of utilization of expressions of folklore should be subject to authorization: whether there is gainful intent; whether the utilization is made by members or non-members of the community from which the expression utilized comes; whether the utilization occurs outside the traditional or customary context or not. In conclusion, it was agreed that utilizations made both with gainful intent and outside their traditional or customary context should be subject to authorization. This means, among other things, that an utilization--even with gainful intent--within the traditional or customary context is not subject to authorization. On the other hand, an utilization, even by members of the community of origin of the expression, requires authorization if it is made outside that context and with gainful intent.

42. "Traditional context" is understood as the way of using an expression of folklore in its proper artistic framework based on continuous usage by the community. For instance, to use a ritual dance in its traditional context means to perform it in the actual framework of the rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as for instance usual ways of selling copies of tangible expressions of folklore by local craftsmen.

43. The Section under consideration then specifies the acts of utilization which require authorization where such circumstances exist. In doing so, it distinguishes between the case in which copies of the expressions are involved and the case in which copies of such expressions are not necessarily involved. In the first case, the acts requiring authorization are publication, reproduction and distribution; in the second case, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and "any other form of communication to the public."

44. "Publication" is understood in the broadest sense of the term, so as to cover any form of making available to the public the original, a copy or copies of an expression of folklore reduced to material form. For the purposes of the Model Provisions, publication covers exhibition, sale or hire alike of one or more copies of tangible expressions of folklore. Reproduction and distribution of expressions of folklore have been made subject to authorization as separate acts, not merely as components of publication. For instance, reproduction of an expression of folklore, with gainful intent and outside its traditional or customary context, is also subject to authorization if made in a single copy for a given buyer or for the purpose of communication to the public at a distance in immaterial form. The notion of reproduction also covers recording of sounds, images or both. Distribution is mentioned separately in view of the possible distribution with gainful intent of existing copies of expressions of folklore not intended for distribution at all or not by the person who made them.

45. The Model Provisions would not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation or performance, in a stylistically varying presentation, of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange, reproduce, recite or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be enforced in societies in which folklore is a part of everyday life. Thus, the Model Provisions allow any member of a community to freely reproduce or perform expressions of the folklore of his own community within their traditional or customary context, irrespective of whether he does it with or without gainful intent and even if done by means of modern technology, if such technology has been accepted by the community as one of the means of the evolution of its living folklore. During the deliberations on this point, some experts suggested that a difference should be made between utilization by means of modern technology and utilization in traditional ways. In conclusion, however, such distinction was discarded in order to facilitate the evolution of living folklore.

46. The Model Provisions would not hinder uses of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research or for archives would not be hampered by the Model Provisions.

47. However, certain obligations exist even where the utilization of expressions of folklore does not require any authorization. These are dealt with in Section 5, paragraph 1, and Section 6, paragraphs 3 and 4.

48. During the deliberations of the Committee, the advantages of preliminary authorization of certain kinds of use of expressions of folklore were weighed against the feasibility of a system of mere checks on their utilization. In this latter case, the exploitation of expressions of folklore would remain free, provided it did not constitute an offense specified by law or did not otherwise prove prejudicial to the legitimate interests of the community in which they had been developed and maintained. However, a system of mere subsequent checks entails serious disadvantages from the point of view of both the users of expressions of folklore and the communities and other entities or individuals having protected interests in the expressions used. A prospective user of an expression of folklore may not always be sure whether the intended use would conflict with legitimate interests. This circumstance would necessitate a system of previous clearance, which would require the regulation of a series of substantive and administrative problems, in order to minimize the factor of uncertainty involved. On the other hand, the entities supervising the utilization of expressions of folklore and safeguarding all related interests would remain without any system of forewarning and could intervene only when the harm had been done and denounced. Under a system of subsequent checks, special difficulties would be met in countries where remuneration for commercial use of expressions of folklore is held just and reasonable. In conclusion, the experts adopted a combined system of authorization and sanctions. The advantages of such a combined system may be demonstrated by the particular case of utilizing secret expressions of folklore. The requirement of previous authorization may help to prevent the use of such expressions, at least for commercial purposes, and subsequent sanctions would become necessary only in cases where authorization was not required by law or where the requirement had been disregarded.

49. In Section 3, reference is also made to the entity entitled to authorize intended utilizations of expressions of folklore. The Model Provisions alternatively refer to "competent authority" and "community concerned," avoiding the term "owner" of the expression concerned. They do not deal with questions of ownership of expressions of folklore since this aspect of the problem may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation, in other countries, the sense of ownership of the traditional artistic heritage may have been more strongly developed in the communities concerned themselves. Who should be entitled to authorize the utilization of expressions of folklore depends very much on the situation as regards ownership of them and necessarily varies according to different legislations on the subject. Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, such uses may be subject to authorization by the community itself, which would grant permission to prospective users in a manner similar to authorization given by authors, as a rule, at full discretion. In other countries, where the traditional artistic heritage of a community is basically considered as a part of the cultural heritage of the nation, or where the communities concerned are not prepared to adequately administer the use of their expressions of folklore themselves, "competent authorities" may be designated, to give the necessary authorizations in form of decisions under public law. Questions relating to the determination of competent authorities and the process of authorization are dealt with below in more detail in connection with Sections 9 and 10 of the Model Provisions.

Exceptions (Section 4)

50. The Model Provisions set out four cases in which there is no need to obtain authorization.

51. The first is the case of utilization for purposes of education. In this case, there is no need for authorization even if the expression of folklore is made accessible against payment, as is the case when selling text books, or offering teaching against tuition fees. Such free utilization of expressions of folklore is allowed for all and any educational purposes and is not restricted--as is the case in some copyright laws for protected works--to utilization "by way of illustration" in the course of teaching.

52. The second case which requires no authorization is that in which the utilization is "by way of illustration" in the original work of an author provided that such utilization is compatible with fair practice. The limits of fair practice could best be determined by applying the same standards that exist in the country in connection with the free use of authors' works protected by copyright. Unlike most copyright laws, however, the Model Provisions do not confine the use by way of illustration to utilization "for purposes of teaching."

53. The third case in which utilization requires no authorization is that in which expressions of folklore are "borrowed" for creating an original work of an author. This important exception serves the purpose of allowing the free development of individual creativity inspired by folklore. The Model Provisions should not and do not hinder in any way the birth of original works based on expressions of folklore, be it the field of visual arts, as e.g. some wooden sculptures of Barlach, or music, as e.g. a number of compositions of Bartok; or literature, like innumerable adaptations of folk tales.

54. The fourth case in which no authorization is required is that of "incidental utilization." In order to elucidate the meaning of "incidental utilization," paragraph 2 mentions in particular (not in an exhaustive manner) the most typical cases considered as incidental utilization: utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

55. Some members of the Committee suggested that there be a reference in the Model Provisions to copyright law to the effect that, in all cases where the latter allowed free use of works, the use of expressions of folklore should also be free. Other members suggested that the Model Provisions should take over the typical free use provisions of copyright laws. However, neither of the suggestions was chosen since many cases of free use in respect of works protected by copyright are irrelevant to the proposed sui generis protection of expressions of folklore, as for example reproduction in the press or communication to the public of any political speech or speech delivered during legal proceedings. It seemed to be more appropriate to adapt to the utilization of expressions of folklore those provisions of copyright laws which were relevant to folklore. This does not mean, however, that national legislations could not also apply other limitations adopted under the copyright law of the country insofar as they were consistent with the special system for protecting expressions of folklore.

Acknowledgement of Source (Section 5)

56. In order to strengthen the links between the originating community and its expressions of folklore, and also as a means of facilitating control over the use of such expressions, the Section under consideration requires that in all printed publications, and in connection with any communication to the public, of an expression of folklore its source must be indicated by mentioning in an appropriate manner the community and/or the geographic place from which the expression utilized has been derived. The words "source" and "derived" have been used with regard to the fact that it may often be difficult to determine where the given expression of folklore actually originated, in particular in cases where the originating community extends over the territory of more than one country, or where the community adopted, maintained or further developed an expression originating, in the ultimate analysis, from elsewhere.

57. This requirement would only apply in cases where the source of the expression of folklore is "identifiable," that is to say, where its user can be expected to know where such expression comes from or from which community it derives.

58. Acknowledgement of the source of the expression is not required in two cases where it would be unreasonable to insist on it: in connection with incidental utilizations and where expressions of folklore are adapted for creating an original work of an author.

59. Omission of acknowledgement of the source in cases where acknowledgement is required is subject to a fine (see Section 6).

60. Complying with the requirement of acknowledgement of the source of an expression of folklore used does not give exemption from the obligation under copyright to also indicate authorship whenever the expression of folklore has been derived in an original form, created by an individual reflecting the traditional artistic expectations of the community in a way which entitles that individual to copyright protection as well.

Offenses (Section 6)

61. Paragraph 1 deals with non-compliance with the requirement of acknowledgement of the source of the expression of folklore. Paragraph 2 deals with the unauthorized utilization of an expression of folklore, where authorization is required. It is understood that the offense of using an expression without authorization is also constituted by uses going beyond the limits or that are contrary to the conditions of an authorization obtained. Paragraphs 3 and 4 provide for two special cases, namely deception of the public and distortion of the expression of folklore. The first consists essentially in "passing off," that is, the creation of the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case. The other offense can be constituted by any kind of public utilization distorting the expression of folklore, in any direct or indirect manner "prejudicial to the cultural interests of the community concerned." The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore published, reproduced, distributed, performed or otherwise communicated to the public by the culprit.

62. Naturally, two, three or all four of the said offenses may be committed cumulatively.

63. All four kinds of offenses are conditional on willful action. However, as regards non-compliance with the requirement of acknowledgement of source and the need to obtain authorization to use the expression of folklore, the Model Provisions also allow (in square brackets) for punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties involved in proving willfulness in cases of omission.

64. The sanctions for each type of offense established by the Model Provisions should be determined in accordance with the penal law of the country concerned. The two main types of possible punishments appear to be fine and imprisonment. Which of these sanctions should apply, what kinds of other punishments could be provided for and whether the sanctions should be applicable separately or also in conjunction, depends on the nature of the offense, the importance of the interests to be protected and the solutions already adopted in the country for similar offenses. The minimum and maximum amounts of fines or terms of imprisonment would likewise depend on the actual practice of each country. Consequently, the Model Provisions do not suggest any kind of relevant solution.

65. It is to be noted that the protection afforded by the Model Provisions is not limited in time. This is one of the interesting differences between the Model Provisions and copyright laws. Protection not limited in time is justified by the fact that the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time. However, whether an action can be brought before a court without regard to the time elapsed since the date of the infringement or offense was committed, is another question. Since statutes of limitation generally exist for both penal and civil sanctions, in the applicable national law, the Model Provisions do not contain any rule of prescription. It is to be assumed that in this context, the general rules of the statute of limitations or prescriptions for penal sanctions (as well as possible related civil action) will also be applicable to offenses under the Model Provisions.

Seizure and Other Actions (Section 7)

66. This Section applies in the case of any violation of the law to both objects and receipts.

67. Object is understood as meaning "any object which was made in violation of this [law]," for example, copies of written expressions of folklore, phonograph records of musical expressions of folklore, videocassettes of a folklore dance performance, copies of drawings, etc., belonging to folklore, provided they were made in violation of Section 3--that is to say, simply stated, without authorization and with gainful intent--or of Section 5, that is to say, simply stated, where objects are published, etc., without indicating their origin in an appropriate manner, or of Section 6, paragraphs 3 and 4, that is to say, in a manner deceiving the public in respect of their source or distorting the expression of folklore they embody.

68. The receipts are "receipts of the person violating it [that is to say, violating the law]"; typical examples are the receipts of the seller of any infringing object and the receipts of the organizer of an infringing public performance.

69. Such objects and receipts are subject, according to one alternative, to "seizure," and according to another alternative, to "applicable actions and remedies." Such actions or remedies might, for example, consist of prohibition of stocking, importing and exporting. It should be noted that seizure and other similar actions are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may be provided as well in other branches of the law, including the law on civil procedure. Seizure would take place in accordance with the legislation of each country.

70. The Model Provisions do not provide for seizure of implements used for perpetrating the violation of the law since such measure is not generally adopted in other fields of protection of intellectual property. It should be noted, however, that a sanction of that kind is not alien to the copyright law of quite a few countries and it would not be contrary to either the spirit or the wording of the Model Provisions also to extend seizure or other similar action to implements used mainly or solely for unlawful utilization of expressions of folklore. Such articles may be, for example, plates, matrices, films or copying devices, sound or video recorders and various other tools.

Civil Remedies (Section 8)

71. This Section emphasizes that the penal sanctions provided for in Section 6 are no substitute for damages or other civil remedies; on the contrary, Section 6 is without prejudice to the availability of such remedies. Such remedies typically include compensation for any damage caused by the unlawful utilization of the expression of folklore, such as the loss of fees normally requested for proper authorization. They also include compensation for any harm done to the reputation of the community concerned on account of the distortion of the expression of folklore.

Authorities (Section 9)

72. Section 3 subjects certain utilizations of expressions of folklore to authorization by either a "competent authority" or, alternatively, according to the choice of each country, the "community concerned" as such. Section 9 provides for the designation of the competent authority, if that alternative was preferred by the legislator. The same Section also provides, in a second paragraph in square brackets, for designation of a "supervisory authority," if this should become necessary owing to the adoption of certain subsequent provisions suggested alternatively as regards activities to be carried out by such an authority. "Authority" is to be understood as any person or body entitled to carry out functions specified in the Model Provisions.

73. According to those provisions, the tasks of the competent authority are (provided such an authority has been designated) to grant authorizations for certain kinds of utilization of expressions of folklore (Section 3), to receive applications for authorization of utilizations (Section 10, paragraph 1), decide on them (Section 10, paragraph 2) and, where authorization is granted, to fix and collect a fee--where required--(Section 10, paragraph 2). The Model Provisions also provide that any decision of the competent authority is appealable (Section 10, paragraph 3, and Section 11, paragraph 1).

74. As far as the supervisory authority is concerned, the Model Provisions offer the possibility (in square brackets) of providing in the law that the supervisory authority shall establish a tariff of the fees payable for authorizations of utilizations, or shall approve such tariff (without indication in the Model Provisions as to who will, in such case, propose the tariff, although it was understood by the experts that, in such a case, the competent authority would propose the tariff)(Section 10, paragraph 2), and that the supervisory authority's decision may be appealed to a court (Section 11, paragraph 1).

75. The aim of the Section under consideration (Section 9) is that the legislator (or other body issuing the provisions) should specify their identity, if it is wished to designate such authorities. Which authority or authorities will be designated in a given country, will largely depend on the legal system existing in that country.

76. A possible solution would be to set up a special authority for the purpose of dealing with the tasks laid down in the Model Provisions and to designate a ministry, for example, the Ministry of Culture, as the supervisory authority. As far as the competent authority is concerned it could be the Ministry of Culture or Arts, any public institution for matters related to folklore, authors' society or similar institution. A representative body of the community concerned could likewise be designated, even where, for whatever reason, the legislator had preferred not to recognize the community itself, in its capacity of owner of its expressions of folklore, as being entitled to directly authorize utilizations of such expressions.

77. If the legislator decided that the community itself--rather than the "competent authority"--was entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the experts were of the opinion that if it was not the community as such, but a designated representative body thereof, which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

78. It is also conceivable that instead of one authority, specially set up for the purpose, one or more institutions, already existing or newly established, could be designated as competent authorities.

79. It would seem eminently useful and logical if representatives of the various folklore communities of the country were to be associated and given an important role in the work of any competent authority or authorities. Furthermore, representatives of cultural and ethnological institutions, including museums, having experience in certain aspects of the protection of folklore, could likewise be associated in the work of the competent authority or authorities.

Authorization (Section 10)

80. Paragraph 1 implies that an authorization required under Section 3 must be preceded by, and be the consequence of, an "application" submitted to the competent authority or the community concerned. By placing the words "in writing" within square brackets, the Model Provisions invite reflection on the question whether oral applications should be allowed. The paragraph permits the authorization to be "individual" or "blanket," the first meaning an ad hoc authorization, the second intended for customary utilizers such as cultural institutions, theatres, ballet groups and broadcasting and television organizations. In this latter context, national legislators may also consider the applicability of systems of non-voluntary licensing possibly existing in the country concerning utilization of works protected by copyright, with special regard to certain kinds of uses by broadcasting organizations and cable systems.

81. The Model Provisions do not give any guidance as regards the information any application for authorization has to contain. An appropriate regulation on applications to be submitted to the competent authority or the community concerned can be issued by each State in accordance with the conditions existing in the State concerned. It is advisable to require the following data, indispensable to enable the competent authority or the community

concerned to make its decision: (i) information concerning the prospective user of the expression of folklore, in particular his name, professional activity and address; (ii) information concerning the expression to be used, properly identifying it by mentioning also its source; (iii) information as regards the intended utilization, which should comprise, in the case of intended reproduction, the proposed number of copies and territory of distribution of the reproduced copies; as regards recitals, performances and other communications to the public, the nature and number of them, as well as the territory to be covered by the authorization. Naturally, it will be easier to comply with such requirements if applications are required to be submitted in writing.

82. The Model Provisions do not contain provisions concerning the process of granting the authorization. However, it is advisable that the decision should be required, by a decree implementing the law, within a certain number of days, 15 or 30 days having been put forward by several experts. The period should be long enough to give sufficient time for the examination of the application, but short enough not to hamper envisaged utilizations of expressions of folklore. If the competent authority or community concerned does not communicate the decision--in writing--to the applicant within the applicable period, the authorization applied for should be regarded as granted.

83. It should be required that, if the application is rejected, the rejection should be accompanied by the reasons therefor. Such reasons may, inter alia, stem from the proposed kind of utilization, for example, if the use of artistic forms of a religious ritual is intended in the framework of a night club show.

84. Paragraph 2 allows, but does not make mandatory, the collecting of fees for authorizations. Presumably, where a fee is fixed, the authorization will be effective only on condition of payment. Authorizations may be granted free of the obligation of paying a fee. Even in such cases, the system of authorization is justified since it may prevent such utilizations as would distort the expressions of folklore or otherwise be unworthy of their dignity. Where fees are charged, they must be fixed according to a tariff established or approved--as already mentioned--by the supervisory authority.

85. Paragraph 2 also deals with the purpose for which the collected fees must be used. It contains some alternatives. It offers a choice between the promoting or safeguarding of national culture or of national folklore. Naturally, national folklore is part of national culture, but national culture concerns a greater number of potential beneficiaries than national folklore. It is advisable, in any case, to secure by decree that a certain percentage of any fee collected--if it is a competent authority which is designated--is to go to that community from which the expression of folklore for the utilization of which the fee was paid originates. The relevant decree may allow, in such case, the competent authority to retain part of the collected fees to cover the costs of administering the authorization system. Where there is no competent authority designated and the authorization is given and the collection of the fees is carried out by the community itself, it seems obvious that the employment of the collected fees should also be decided by the community. The State should secure its share of such revenues, if at all, by imposing on them taxes or by providing for other appropriate measures.

86. Paragraph 3 provides that any decision of the competent authority is appealable. It specifies that the appeal may be made by the applicant (typically, where the authorization is denied) and by "the representative of the interested community" (typically, where the authorization is granted). The paragraph is put in square brackets since it does not apply where the authorization is granted by the community concerned. The decisions of such community are not subject to appeal.

Jurisdiction (Section 11)

87. The aim of paragraph 1 is that the legislator (or other body issuing the provision) should specify a court which will be competent to hear appeals against decisions of the authority concerned. Which court will, in any given country, be specified, will largely depend on the existing court system of that country. The fact that the expressions "competent authority" and "supervisory authority" appear within square brackets seems to indicate that, in the second case, a system may be adopted in which an appeal against a decision of the competent authority must be submitted to the supervisory authority and that appeal to the court is possible only from a decision of the supervisory authority. Naturally, paragraph 1 only applies where the making

of decisions falls within the competence of an "authority" and is not within the power of the community concerned. If it is the concerned community which is entitled to make decisions as regards utilization of its expressions of folklore, paragraph 1 is inapplicable and paragraph 2 remains the only provision of Section 11.

88. The aim of paragraph 2 is that the legislator (or other body issuing the provision) should specify a court which will be competent for the procedures laid down under Section 6. Which court will, in any given country, be specified, will largely depend on the existing court system of that country.

Relation to Other Forms of Protection (Section 12)

89. This Section is intended, in essence, to provide that, if anything that is protected by the Model Provisions (because it is an expression of folklore) is also protectible under other laws and international treaties (because it is also something other than an expression of folklore), it will also be protected under such laws and treaties. In other words, in such cases, the protection offered by the law (or decree, etc.) of the country containing provisions corresponding to those of the Model Provisions would be concurrent with the protection offered by other laws of the country or by treaties to which the country is a party.

90. A few examples of such other laws are the following:

(i) the copyright law, which would apply if the expression of folklore is also a "work," as understood in copyright law, as e.g. in cases where an individual develops an expression of folklore so that it reflects the traditional artistic expectations of the community concerned (so that it becomes part of the body of expressions of folklore of that community) by having, at the same time, sufficient originality given to it by its author (so that it also qualifies as a work of authorship);

(ii) the law protecting performers, which would apply to performers who perform expressions of folklore, particularly actors, dancers and musicians playing in plays constituting expressions of folklore, dancing folk dances or singing or playing folk songs or instrumental folk music. As already mentioned in paragraph 12, it is advisable to secure the link between the protection of expressions of folklore and their performance also by making it clear in any law protecting performers of literary and artistic works that the performance of expressions of folklore are to be regarded as a performance of such works;

(iii) the law protecting producers of phonograms which contain, for example, the recordings of performances of recitals of folk tales, folk poetry, folk songs, instrumental folk music or folk plays;

(iv) the law protecting broadcasting organizations, which broadcast an expression of folklore;

(v) the law protecting industrial property, which would apply, for example, if the expression of the folklore is used as an industrial design, a mark or an appellation of origin, or when the use of an expression of folklore is the object of unfair competition;

(vi) the law protecting cultural heritage, which would apply for the protection of, for example, architectural expressions of folklore in forms like groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in landscape, are of outstanding universal value from the point of view of history, art or science; and

(vii) certain laws aimed at the preservation of moving images which would apply for the protection of, for example, cinematographic, television or videographic productions of expressions of folklore, such protection being in addition to that provided for by the copyright legislation.

91. Examples for international treaties or other forms of protection referred to by this Section, are (i) the Berne Convention, with special regard to its Article 15(4) which provides protection for "unpublished works where the identity of the author is unknown," as explained in greater detail in paragraph 9; (ii) the Universal Copyright Convention; (iii) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (iv) the Convention for the Protection of Producers

of Phonograms Against Unauthorized Duplication of Their Phonograms; (v) the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; (vi) the Paris Convention for the Protection of Industrial Property; (vii) the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods; (viii) the various special agreements concluded under the aegis of the Paris Union; (ix) the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of Unesco in 1972, which recognizes that the duty of ensuring protection of the cultural and national heritage belongs primarily to the State and recommends that States take appropriate measures to this end; (x) the "Recommendation for the Safeguarding and Preservation of Moving Images," adopted by the General Conference of Unesco in 1980, which considers that moving images are an expression of the cultural identity of the peoples and form an integral part of the cultural heritage of the nations, and which invites States to take all necessary steps to safeguard and preserve effectively this heritage.

Interpretation (Section 13)

92. This Section emphasizes a principle underlying the whole system of sui generis protection of expressions of folklore: this protection should in no way hinder the normal use and development of expressions of folklore. What is probably meant in the first place is that the community by which and in which certain expressions of folklore have developed should be free to use this, their "traditional artistic heritage" (Section 2), and to develop it, without the need for authorizations provided for in Section 3. It was also agreed by the experts that no use of an expression of folklore within the community which has developed and maintained it should be qualified as distorting the same if the community identifies itself with the present-day use of that expression and its consequent modification.

Protection of Expressions of Folklore of Foreign Countries (Section 14)

93. The Model Provisions should pave the way for subregional, regional and international protection. It is of paramount importance to protect expressions of folklore against illicit commercialization and distortion beyond the frontiers of the country in which they originate. Regional and international protection of expressions of folklore serves to protect expressions of folklore against illicit use that takes place abroad. On the other hand, national legislation on the protection of expressions of folklore also provides the best basis for protecting the expressions of folklore of communities belonging to foreign countries. By appropriate extension of their applicability under the principle of national treatment, national provisions may provide the substance of regional or international protection.

94. In order to further such a process, the Model Provisions provide for their application as regards expressions of folklore of foreign origin either subject to reciprocity or on the basis of international treaties. Actual reciprocity in the relations of two or more countries already protecting their national folklore may sometimes be established and declared more easily than mutual protection by means of concluding and ratifying international treaties. However, a number of experts stressed that international measures are an indispensable means of extending the protection of expressions of folklore of a given country beyond the borders of that country. In this context, the possibility of developing existing intergovernmental cultural or other appropriate agreements, so as to cover also reciprocal protection of expressions of folklore, should likewise be considered. On the question of international regulation, some experts expressed the opinion that, while they are in favor of considering the possibility of adoption of international regulation, priority should be given to regulation at national and regional levels.

Transitional Provisions

95. The Model Provisions do not contain transitional rules. However, each country which adopts a law along the lines of the Model Provisions would need to enact such rules, with regard to utilizations of expressions of folklore subject to authorization under the new law but lawfully commenced before its entry into force. The legislator will have to choose one of three basic solutions: (i) retroactivity of the law, which means that such utilizations of expressions of folklore would also become subject to authorization as have been lawfully commenced earlier but continued after the entry into force of

the law, as for instance series of performances or distribution of copies of an expression of folklore; (ii) non-retroactivity of the law, which means that only those utilizations would come under the law that had not been commenced before its entry into force; and (iii) an intermediate solution: utilizations which became subject to authorization under the law but were commenced without authorization before its entry into force should be brought to an end before the expiry of a certain period if no relevant authorization was obtained by the user in the meantime.